No. 72-252

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, PETITIONER

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RENEGOTIATION BOARD

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No. 72-822

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-44a) is reported at 466 F. 2d 345. The orders of the district court (Pet. App. B, pp. 45a-60a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1972. The petition for a writ of certiorari

was filed on December 4, 1972,[1] and was granted on January 22, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Freedom of Information Act authorizes the district courts to enjoin agency proceedings until the court determines whether litigants before the agency are entitled to documents sought under the Act.

2. If the district court has such jurisdiction, whether it was properly exercised in enjoining proceedings under the Renegotiation Act until the court can deterine whether contractors whose profits are being renegotiated are entitled to the documents requested.

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, and of the Renegotiation Act, 50 U.S.C. App. 1211, *et seq.*, are set forth in Pet. App. C, pp. 61a-67a.

STATEMENT

1. Respondents are contractors whose profits on defense contracts are undergoing renegotiation pursuant to the Renegotiation Act, 50 U.S.C. App. 1211, *et seq.* That Act provides that the "sound execution

[1] The time for filing the petition for a writ of certiorari was extended by orders of the Chief Justice dated October 4, 1972 and November 8, 1972 until December 4, 1972.

of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts," 50 U.S.C. App. 1211, and establishes the Renegotiation Board as an independent agency in the executive branch to accomplish this objective, 50 U.S.C. App. 1217(a). As its name suggests, the Board operates primarily by informal negotiation with defense contractors rather than by formal hearings;[2] the Board is directed to "endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." 50 U.S.C. App. 1215(a).[3] These negotiations are to be completed within two years; otherwise, "all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged * * *." 50 U.S.C. App. 1215 (c).[4]

Where the Board and the contractor are unable to agree upon the amount of excessive profits, the Board may determine these profits. 50 U.S.C. App. 1215 (a). The contractor may then initiate proceedings

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[2] The Board is exempted from the requirements of the Administrative Procedure Act, except for the Public Information section thereof. 50 U.S.C. App. 1221.

[3] From its inception during World War II through June, 1970, the Board reached voluntary agreement with the contractor in 88 percent of its cases. *Fifteenth Annual Report of the Renegotiation Board*, December 31, 1970, p. 13.

[4] Respondents have agreed to suspend this limitation pending resolution of their Freedom of Information Act claims (Pet. App. 30a, n. 12).

in the Court of Claims to determine its indebtedness to the United States.[4] Such proceedings "shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." 50 U.S.C. App. 1218.

Renegotiation is initiated by the reference of the contractor's statement to the appropriate Regional Board for investigation. 32 C.F.R. 1472.3. The renegotiation process encompasses several levels in the agency: first, Regional Board staff, then a panel of the Regional Board, the Regional Board itself, a division of the Renegotiation Board, and finally the Renegotiation Board itself. At each level, there is consultation with the contractor, preparation of a report and analysis of the consultation, and submission to the next higher level of a recommendation with respect to the excess profits to be assessed (32 C.F.R. 1472.3(d); 32 C.F.R. 1472.3(f)-(i); 32 C.F.R. 1472.4 (b)-(d)). At each stage, the contractor is entitled, at the time he learns of the recommendation concerning his excess profits, to a statement of the basis for the recommendation (32 C.F.R. 1472.3(f); 32 C.F.R. 1472.3(i); 32 C.F.R. 1472.4(d)). No level is bound by the determination of the level below; the recommended settlement may increase or decrease at each level (32 C.F.R. 1472.3(h); 32 C.F.R. 1472.3(i); 32 C.F.R. 1472.4(b); 32 C.F.R. 1472.4(d)).

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[4] Until 1971, such proceedings were conducted in the Tax Court. P.L. 92-41, 85 Stat. 97, amended the Renegotiation Act to substitute the Court of Claims for the Tax Court.

If no agreement is reached, the Board issues an order determining the amount of the contractor's excess profits (32 C.F.R. 1472.4(d)), and at the contractor's request, furnishes him "with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination." 50 U.S.C. App. 1215(a); see 32 C.F.R. 1472.4(d). The Renegotiation Act provides that "Such statement shall not be used" in the Court of Claims "as proof of the facts or conclusions stated therein." 50 U.S.C. App. 1215(a).

2. During renegotiation proceedings, the respondent contractors requested a number of documents from the Renegotiation Board under the Freedom of Information Act, 5 U.S.C. 552(a)(3).* The Board supplied certain of the documents sought, but refused to release others, including staff reports analyzing the basis for the staff's recommendation on the

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* Astro Communication Laboratory requested, *inter alia*, the recommendations contained in the renegotiation report prepared by the Regional Board staff, and "all records, analyses, determinations, opinions, reports, or summaries" bearing upon the renegotiation of its profits (App. 6-7). Bannercraft Clothing Company sought, *inter alia*, all communications between government agencies regarding Bannercraft's performance of its contracts, and the disposition of renegotiation proceedings involving a number of its competitors (App. 32-33). David B. Lilly Co. sought, *inter alia*, the recommendations contained in the renegotiation report, material supplied by other government agencies, and "All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board" in its case (App. 73-74).

amount of excess profits involved (App. 11-13, 52-59, 94-96, 99-101).

The contractors then filed suit in the district court under the Freedom of Information Act to compel disclosure; they also sought an injunction against further renegotiation proceedings pending a decision on the merits of their Information Act claims (Pet. App. A, pp. 3a-4a). The contractors alleged that the continuation of renegotiation proceedings without disclosure of those documents would deny them due process of law (App. 40, 4, 70).[1] The district court granted each of the requested injunctions without opinion (Pet. App. B, pp. 45a-60a).

The court of appeals, one judge dissenting, affirmed. It held that (1) the Freedom of Information Act grants jurisdiction to enter such injunctions, and (2) the exercise of such jurisdiction was proper when the contractors were engaged in renegotiation under the Renegotiation Act (Pet. App. A, pp. 4a-5a).

The court began by analyzing the Renegotiation Act, concluding that contractors undergoing renegotiation need documents in the Board's possession to learn "the strength of the Board's case against them

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[1] At the time these actions were brought, David B. Lilly Co. was meeting with regional board staff who had tentatively determined that the company had realized excess profits of $700,000, the Eastern Regional Board had tentatively determined that Astro Communication Laboratory had realized excess profits of $225,000, and the Renegotiation Board had ruled that Bannercraft Clothing Company had realized excess profits totalling $1,625,000, but no final order had been entered pending further negotiation (Pet. App. A, p. 9a).

and the facts on which the Board relies in assessing liability."*

The court then held that the Information Act implicitly confers jurisdiction to issue the injunctions (Pet. App. A, pp. 11a-16a), since a subsidiary purpose of the Act was to protect "those forced to litigate with agencies on the basis of secret laws or incomplete information" (Pet. App. A, p. 12a). The court also concluded that in enacting the statute, Congress intended to confer broad equitable jurisdiction upon the district courts (Pet. App. A, pp. 13a-14a). Without discussing the specific sanctions provided in each of the disclosure sections of the Information Act, the court concluded that jurisdiction to enjoin agency proceedings existed because this "may be necessary on occasion to enforce the policy of the Freedom of Information Act * * *" (Pet. App. A, p. 16a).

Turning to the exhaustion-of-remedies question, the court concluded that requiring the contractors to com-

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* The court's discussion of the procedures followed under the Act and regulations omits any mention of the contractor's right to be informed of the basis for the Board's action at each stage of the proceedings. As summarized above, the Board's regulations give the contractor the right to obtain the accounting section of the report of renegotiation, 32 C.F.R. 1472.3(d); the right to be informed of the reasons for the tentative recommendation by the regional board personnel, 32 C.F.R. 1472.3(f); the right to a summary of facts and reasons for the Regional Board's final determination, 32 C.F.R. 1472.3(i); the right to a summary of facts and reasons for the Board's final determination, 32 C.F.R. 1472.4(d); and the right to a statement of the facts and reasons when a final order is entered by the Board; 50 U.S.C. App. 1215(a); 32 C.F.R. 1472.4(d).

plete the statutorily prescribed administrative proceedings was unnecessary because "no legitimate judicial policy would be served by depriving these appellees of the relief they seek" (Pet. App. A, p. 19a). The court reasoned that the contractors need only exhaust their administrative remedies under the Information Act, and not their remedies under the Renegotiation Act, prior to requesting injunctive relief against renegotiation proceedings (Pet. App. A, pp. 21a-26a). It found their remedies before the Board and in *de novo* proceedings in the Court of Claims inadequate, precisely because the contractors could not there raise the claim that denial of the documents sought deprived them of due process before the Board, due to the fact that the Court of Claims proceedings are conducted *de novo* (Pet. App. A, p. 22a).

The dissenting judge concluded that the Freedom of Information Act's creation of a specific right with a specific remedy to enforce it—*i.e.*, ordering disclosure of any matter improperly withheld—rendered that remedy exclusive (Pet. App. A, pp. 32a-39a). He found no "suggestion that Congress had any special interest in or concern with litigants before the administrative agencies" (Pet. App. A, pp. 35a-36a). He also found improper the majority's reliance upon decisions indicating that the conferring of equity jurisdiction is intended to cover the full scope of equity power, for the relief

> accorded by the majority is relief allegedly made necessary by the *special needs* of the appellees—a basis for relief to which the remedies of the

> Information Act were not addressed. In such circumstances, litigants with *special needs* constitute a class of persons that the remedies of the Information Act did not intend to accommodate * * *. [Pet. App. A, p. 37a.]

Disagreeing also with the majority's view of exhaustion, the dissenting judge believed that the court's position "seriously misconstrues the intended functioning of the Renegotiation Board's procedures—controlled access to information concerning the Government's position in the negotiations plays a significant role in the administrative process before the Board" (Pet. App. A, p. 41a). The interruption of these proceedings by an injunction under the Information Act, he believed, frustrated the Renegotiation Act's basic purposes. The dissent concluded that these cases involved not a request for relief under the Information Act but "a challenge to the Board's procedures themselves" (Pet. App. A, p. 42a); and that the decisions of this Court requiring the Renegotiation Act remedies to be exhausted are therefore controlling.[9]

SUMMARY OF ARGUMENT

The Freedom of Information Act directs that certain agency records be made available to the public, and contains specific provisions to assure that avail-

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[9] *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 742; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540.

ability with minimum interference with agency activities. The district courts are authorized to compel production of improperly withheld agency records. These provisions are designed to assure prompt judicial consideration of agency refusals to make documents available, but they do not include a grant of jurisdiction to enjoin agency proceedings pending such consideration.

To read such jurisdiction into the Act by implication is neither consistent with the statutory language nor necessary to effectuate the Act's purposes. The interference with ongoing proceedings necessarily involved would upset the balance struck in the Freedom of Information Act between the public's right to have access to agency records and the need for efficient agency action. Moreover, it would do so to further the special interests of parties before the agency, a class the Freedom of Information Act was not designed to protect.

In permitting the interruption of renegotiation prior to the exhaustion of the prescribed administrative and judicial proceedings, the decision below also misconstrues the Renegotiation Act, and is contrary to the rulings of this Court. The Act contemplates informal negotiations, leading to prompt voluntary agreements on appropriate refunds, with *de novo* judicial consideration if the negotiations are unsuccessful. This Court has recognized the congressional intention to expedite the renegotiation process, and has refused to permit the enjoining of renegotiation proceedings even when, as here, the contractor alleged that the Board's refusal to disclose the data upon

which it relied denied due process, *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752. It has also held that the opportunity for a *de novo* hearing before the Tax Court (now the Court of Claims) satisfies due process, *Lichter* v. *United States*, 334 U.S. 742.

The court below misconstrued the Renegotiation Act in concluding that the release of the documents sought, including internal Board memoranda, may be necessary to permit meaningful negotiation between the parties. In contrast to litigation, in which comprehensive discovery is appropriate at an early stage, the renegotiation process contemplated by the Act involves the carefully controlled disclosure at various stages during the negotiation process of the basis for the government's offers of settlement. The court below incorrectly ignored both the difference between negotiation and litigation, and the contribution of the limitation on disclosures to the bargaining strength of the Board.

ARGUMENT

I

THE FREEDOM OF INFORMATION ACT DOES NOT AUTHORIZE THE COURTS TO ENJOIN AGENCY PROCEEDINGS UNTIL CLAIMS FOR DOCUMENTS SOUGHT THEREUNDER ARE RESOLVED.

A. Congress Intended the Provision for Judicial Orders Directing Production of Agency Records to be the Exclusive Method for Enforcing the Disclosure Requirements of the Act.

In the Freedom of Information Act,[10] Congress sought "to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements" except those specifically exempted. H. Rep. No. 1497, 89th Cong., 2d Sess., p. 1 (hereafter "H. Rep. No. 1497"). The basic reason for the Freedom of Information Act was congressional concern that "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." S. Rep. No. 813, 89th Cong., 1st Sess., p. 3 (hereafter "S. Rep. No. 813"). Accordingly, the Act's "ultimate purpose was to enable the public to have sufficient information in order

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[10] Originally enacted in 1966 as P.L. 89-487, 80 Stat. 250, the Act was codified in 5 U.S.C. 552 by P.L. 90-23, 81 Stat. 54. The Act substantially revised Section 3, the public information section, of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002.

to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813, 816 (C.A. 2), certiorari denied, 409 U.S. 889; see *Soucie* v. *David*, 448 F. 2d 1067, 1076 (C.A.D.C.).

Concerned that the Act might not accomplish its purpose without provisions to insure compliance, S. Rep. No. 813, at 3, Congress created "a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency* v. *Mink*, No. 71-909, decided January 22, 1973, slip op. p. 6.[11] Congress authorized the district courts to "order the production of any agency records improperly withheld" and to "punish for contempt the responsible employee" if such order is not obeyed. 5 U.S.C. 552(a)(3).

Congress further provided that the enforcement proceedings in the district court be *de novo*, placed the burden upon the government to justify any refusal to produce documents, and directed that proceedings in the district court "take precedence on the docket over all other causes and shall be assigned

[11] Although the suggestion was made, in the House hearings preceding adoption of the Information Act, that review be covered in the general judicial review provisions of the Administrative Procedure Act, Congress instead wrote a specific grant of jurisdiction into the Act. See Hearings before a Subcommittee of the House Committee on Government Operations on Federal Public Records Law, 89th Cong., 1st Sess., March-April, 1965, at 107-109.

for hearing and trial at the earliest practicable date and expedited in every way." *Id.* Thus the Act, as the House Committee report points out, "contains a specific remedy for any improper withholding of agency records by granting the U.S. district courts jurisdiction to order the production of agency records improperly withheld." H. Rep. No. 1497, at 9; see S. Rep. No. 813, at 8.[12]

This "specific remedy" in its present form was added to the legislation which ultimately became the Freedom of Information Act by amendments proposed by the Senate Committee on the Judiciary. See S. Rep. No. 1219, 88th Cong., 2d Sess., p. 3.[13] The Committee report explains:

> The provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power.

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[12] The other disclosure provisions of the Act, dealing with material required to be published in the Federal Register (5 U.S.C. 552(a)(1)) and agency opinions, statements and manuals which must be made available (5 U.S.C. 552(a)(2)), contain, in addition, their own specific methods of enforcement. These sections provide that a person may not be bound by an item required to be published in the Federal Register and not so published, and that an order or opinion which has not been made available or indexed may not be cited against a person by the agency.

[13] S. 1666, 88th Cong., 2d Sess., passed the Senate in the 88th Congress too late to be considered by the House of Representatives. In the 89th Congress S. 1160, which "is substantially S. 1666," was introduced and became the Information Act. See S. Rep. No. 813, at 4. No changes were made in the judicial remedies provided.

> * * * This [amendment] has been made to avoid any possible misunderstanding as to the courts' powers.
>
> Further, this change would give precedence to actions for withholding [sic]. Without this, the remedy might be of little practical value.

S. Rep. No. 1219, *supra*, at 7. This remedy, like the substantive exemption provisions, reflects the congressional purpose of "providing a workable formula which encompasses, balances, and protects all interests * * *." S. Rep. No. 813, at 3.

In the Freedom of Information Act Congress thus has created a right and has provided a special remedy for enforcing that right, which therefore "is exclusive." *United States* v. *Babcock*, 250 U.S. 328, 330-331. Congress

> decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. [*Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301.]

Accordingly, this is not a situation where "Congress has utilized * * * the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest," *Porter* v. *Warner Holding Co.*, 328 U.S 395, 403. Nor, since the purpose of the statute is to make government records available to the public, is the exercise of this jurisdiction necessary to give effect to the policy of the legislature.

See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292. Instead, as this Court observed in *Environmental Protection Agency* v. *Mink*, *supra*, at 13, n. 13,

> * * * in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the Government's action.

For the same reasons, the Information Act does not empower the courts to impose the additional equitable sanction of enjoining administrative proceedings until documents sought under that Act are produced. Congress intended the issuance of orders compelling production to be the sole method of judicial enforcement of the Act.

Except for a subsequent decision of the District of Columbia Circuit relying on the present case (*Sears, Roebuck & Co.* v. *National Labor Relations Board*, 473 F. 2d 91, 93, petition for certiorari pending, No. 72-1503 [14]), the federal courts have uniformly held that they have no power to enjoin agency proceedings pending the disposition of a claim under the Information Act. *Sears, Roebuck & Co.* v. *National Labor Relations Board*, 433 F.2d 210 (C.A. 6); *Missouri-Portland Cement Co.* v. *Federal Trade Commission*, D.D.C., No. 474-71, decided August 16,

[14] Although the court there stated that the district court had jurisdiction to enjoin agency proceedings, it concluded that, in the circumstances of that case, an injunction was improper, since irreparable harm had not been shown.

1972; *General Manufacturing Corp.* v. *The Renegotiation Board*, D. N.J., No. 965-70, decided November 5, 1970; *Grumman Corporation* v. *The Renegotiation Board*, D.D.C., No. 3097-70, decided October 20, 1970, appeal dismissed, C.A.D.C., No. 27726, decided October 27, 1970; *Holly Corporation* v. *The Renegotiation Board*, C.D. Calif., No. 69-198, decided February 11, 1969; see *Sterling Drug Inc.* v. *Federal Trade Commission*, 450 F.2d 698 (C.A.D.C.); *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F.2d 935 (C.A. D.C.), certiorari denied, 400 U.S. 824.[15]

The Sixth Circuit refused to enjoin proceedings before the National Labor Relations Board until documents which the plaintiff sought to use in Board proceedings were produced under the Information Act. *Sears, Roebuck & Co.* v. *National Labor Relations Board*, 433 F.2d 210.[16] There the court, recognizing that the Information Act claim essentially sought to inject the district court into the administrative process at an inappropriate point, stated (433 F.2d at 211):

> The district court was correct in concluding that it was without judisdiction. The prayer for relief contained in plaintiff's complaint requested the court to enjoin further proceedings of the Na-

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[15] See Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 Virginia Law Review, 466, 472-476 (1968), approving this conclusion.

[16] The court in this case noted the *Sears* decision. Pet. App. A, p. 2a. But the court did not discuss or distinguish *Sears*, although the case was heavily relied on by the Board. Appellant's Brief at 9, 3A-6A; reply brief, 5-6.

> tional Labor Relations Board pending final decision on its complaint * * *. Essentially, the form of relief plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records. Plaintiff contends that jurisdiction for such an action is granted to the district courts by the Freedom of Information Act, 5 U.S.C.A. § 552 (a) (3), which grants "* * * jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records * * *." Even assuming the dubious proposition that Congress intended to create an exception to its long-standing policy against enjoining the Board, plaintiff seeks neither an injunction nor an order of the type described above. We therefore conclude that the district court properly dismissed the complaint for lack of jurisdiction * * *.

Although there are distinctions between proceedings before the Renegotiation Board and before the National Labor Relations Board, these differences are irrelevant to the question whether the Freedom of Information Act authorizes the courts to enjoin administrative proceedings where it is alleged that the agency has not complied with the disclosure requirements of the Act.[17] The respondents here make es-

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[17] If a litigant's need were a relevant consideration, the plaintiff's need for the documents in *Sears* might have been greater than that of respondents here, because the review of the Labor Board decision is based upon the administrative record, and Sears would therefore have been limited to that record in challenging the agency's decision. Under the Rene-

sentially the same allegations with regard to jurisdiction as were made in *Sears*; in neither case does the Information Act confer jurisdiction to enjoin pending agency proceedings.

The court of appeals' reliance upon an alleged congressional purpose to benefit litigants before administrative agencies reflected in subsection 552(a)(2) of the Act, which requires the publication and indexing of agency orders, opinions, statements of policy, interpretations and staff manuals (Pet. App. A, pp. 12a-13a), is unpersuasive. As the dissent points out, that section is "solely concerned with the existence of 'secret law' rather than any 'incomplete information' that might be useful to a citizen involved in controversy with an agency" (Pet. App. A, p. 35a). It deals only with agency holdings which affect all members of the public who are potential litigants, and not with the particular material of an individual litigant's case. As explained in H. Rep. No. 1497, at 7, "[t]his material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions."

Moreover, this section "contains its own sanction that orders, opinions, etc., which are not properly

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gotiation Act, however, each respondent is entitled to a *de novo* hearing in the Court of Claims, where he is not bound in any manner by the Board's determination.

indexed and made available to the public may not be relied upon or cited as precedent by an agency." S. Rep. No. 813, at 7. This remedy, together with that provided in subsection 552(a)(3), adequately protects the interests of litigants before an agency; its existence confirms that the Information Act does not authorize the courts to enjoin agency proceedings.

B. The Congressional Purpose in the Act was to Enable the Public to Obtain Information From the Government, not to Enable Litigants to Obtain Information From an Agency for Use in Their Case Before the Agency.

There is nothing in the Act or its legislative history to suggest that Congress intended to permit the courts to enjoin an ongoing administrative proceeding pending a determination whether documents sought under the Information Act for use in that proceeding must be made available. To imply such authority would be inconsistent with the basic purpose of the Act, which was to enable the public generally to obtain information from the government, but not to aid a particular litigant in conducting his case before the agency. As the dissenting judge below correctly pointed out, the injunction

> is relief allegedly made necessary by the *special needs* of the appellees—a basis for relief to which the remedies of the Information Act were not addressed. In such circumstances, litigants with *special needs* constitute a class of persons that the remedies of the Information Act did not intend to accommodate * * *. [Emphasis in original; Pet. App. A, p. 37a.]

Congress did not intend to provide litigants before an agency with any rights, such as the right to stop the agency's processes until documents are produced, greater than those given the general public. The legislative history of the Act suggests the contrary, since Congress broadened the disclosure of public records contained in the Administrative Procedure Act that was limited to "persons properly and directly concerned" (5 U.S.C. (1964 ed.) 1002(c)), to provide that information be made available "to the public," "for public inspection," and "to any person." 5 U.S.C. 552(a), (a)(2), (a)(3), (c); see *Environmental Protection Agency* v. *Mink*, *supra*, at 6. Congress made this change to recognize the "basic right of any person—not just those special classes 'properly and directly concerned'—to gain access to the records of official Government actions," and to establish "the basic principle of a public records law by making the records available to any person." H. Rep. No. 1497, at 5, 8; see also S. Rep. No. 813, at 5-6.

For these reasons, the Freedom of Information Act does not "by its terms, permit inquiry into particularized needs of the individual seeking the information * * *." *Environmental Protection Agency* v. *Mink*, *supra*, at 13. [18] Professor Davis points out that

[18] The courts of appeals have indicated that "[b]y directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief." *Soucie* v. *David*, *supra*, 448 F. 2d at 1077; *Sterling Drug Inc.* v. *Federal Trade Commission*, *supra*, 450 F. 2d at 705. Since disclosure required by the Act does not depend upon the particular needs of litigants, the remedies provided by Congress to enforce

the Act's history emphasizes that "required disclosure under the Act can never depend upon the interest or lack of interest of the party seeking disclosure * * *," because the Act "never takes into account the need of the party seeking disclosure * * *." Davis, *Administrative Law Treatise* (1970 Supp.), §§ 3A.4, at 120; 3A.29, at 171.[19]

It was precisely upon the basis of their "particularized needs," however, that the respondents sought and the court of appeals sustained the injunction against the conduct of further Board proceedings until the issues under the Freedom of Information Act had been resolved. The respondents sought the material from the Board not because it was material to which the public was entitled under the Act, but because they believed it would aid them in conducting the renegotiation procedures in which they were engaged. The injunction is basically designed to aid the respondents in conducting their cases before the Board, not to further the public interest in disclosure of government information. As such, it is inconsis-

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disclosure should not be expanded to protect the particular interests of litigants.

[19] The court below, in *Getman* v. *National Labor Relations Board*, 450 F. 2d 670 (Wright, J.), recognized that "[a]ny discretionary balancing of competing interests will necessarily be inconsistent with the purpose of the Act to give agencies, and courts as well, definitive guidelines in setting information policies," *id.* at 674, n. 10. The court in *Getman* concluded that the explicit language of one exemption required this balancing; but it emphasized that this conclusion was limited to that language alone, *id.* at 674, n. 10; 677, n. 24.

tent with the fundamental purpose of the Freedom of Information Act.

Moreover, permitting such injunctions will encourage parties to attempt to delay administrative proceedings by resort to preliminary litigation over Freedom of Information Act claims. In these cases, for example, the Renegotiation Board and the appropriate Regional Board had tentatively determined that respondents had realized excessive profits on government defense contracts in excess of $2.5 million (Pet. App. A, p. 9a). Under the Renegotiation Act, the government may not take action to recover excess profits until renegotiation proceedings are completed and a final order has been entered; similarly, interest on the amounts ultimately found due does not begin to run until thirty days after such order is entered. 50 U.S.C. App. 1215(b)(1), (2). Thus, the contractor against whom a tentative determination of excessive profits has been made has a substantial incentive to seek delay of renegotiation proceedings to whatever extent possible.[20]

The court of appeals believed that the delay involved would generally be insubstantial, so that the granting of injunctive relief would not materially interfere with agency proceedings. But then an injunction would be unnecessary—and particularly so here, where at least Astro Communication and Lilly

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[20] In these cases, temporary restraining orders were entered on the day the complaint was filed in *Lilly*, and within five and nine days respectively of the filings in *Bannercraft* and *Astro Communication*. Shortly thereafter, they were made preliminary injunctions.

Co. were at the earliest stages of renegotiation proceedings. In fact, however, broad-scale requests for documents under the Freedom of Information Act have usually been resolved only after at least one appeal. See, *e.g.*, *Environmental Protection Agency* v. *Mink*, No. 71-909, decided January 22, 1973; *Sterling Drug Inc.* v. *Federal Trade Commission*, 450 F. 2d 698 (C.A.D.C.).[21] Furthermore, the interference with agency proceedings lies not only in delay, but also in the opportunity provided to use the Information Act as a discovery tool in administrative hearings, with premature judicial review. Cf. *Sears, Roebuck & Co. v. National Labor Relations Board, supra*, 433 F. 2d at 211. The Information Act was not enacted for that purpose.

Our emphasis on the impropriety of enjoining Board proceedings pending a judicial determination regarding the availability of the documents involved under the Act should not be interpreted as indicating any doubt that the Act permits the withholding of these documents.

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[21] Even when the same issue as the one in this case subsequently arose in the same circuit, the case reached the court of appeals, and is currently the subject of a petition for certiorari in this Court (No. 72-1503), *Sears, Roebuck & Co.* v. *National Labor Relations Board*, 473 F. 2d 91. The court's conclusion there that the issuance of an injunction was inappropriate under the particular facts of that case demonstrates that the decision that jurisdiction exists to issue injunctions will encourage lengthy litigation, rather than establishing a right which will obviate the need for further litigation.

The court below pointed out that the issue whether the Act requires the disclosure of the documents respondents sought was not before it (Pet. App. A, p. 3a). That issue is still to be determined by the district court. It is our position, however, that some of the requests of respondents were so vague that they did not constitute "request[s] for identifiable records" (5 U.S.C. 552(a)(3)).[22] Others sought records which were exempt from disclosure under 5 U.S.C. 552(b)(4), as privileged commercial information,[23] or under 5 U.S.C. 552(b)(5), as inter-agency or intra-agency advisory memoranda (App. 32, 74).[24]

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[22] For example, Astro Communication Laboratory sought:

> All documents in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board of the captioned fiscal year of Astro Communications Laboratory, which documents analyze, summarize, discuss, relate to, or in any way bear upon Astro Communications' treatment, recording, reporting, control, or allocation of selling expenses including selling commission expense, advertising expense, operating loss carry-forwards, and corporate management fees. [App. 6.]

[23] For example, Lilly requested:

> All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings. [App. 73.]

[24] For example, Bannercraft requested:

> Interdepartmental and interagency communications between The Renegotiation Board and other Government

Perhaps other specific exemptions in the Act are also applicable to certain of the documents requested.[25]

Thus, though the questions under the Freedom of Information Act itself are not now before the Court, it is evident that the questions raised are substantial, and that the government's defense on the merits of this case is far from frivolous.

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agencies with respect to Bannercraft's bidding, award and performance of its renegotiable contracts for the fiscal years 1966 and 1968. [App. 32.]

Lilly also requested:

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referred renegotiation proceedings. [App. 74.]

[25] In two of the cases the district court concluded, on the basis of *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, 425 F. 2d 578 (C.A.D.C.), that an injunction was proper because it was likely plaintiffs would be successful in their attempt to compel disclosure of the records (Pet. App. B, pp. 46a, 48a). But in *Grumman*, the contractor specifically disavowed any request for access to advisory memoranda (425 F. 2d at 581), and the court concluded that "reports submitted by the prime contractor on Grumman's performance" (similar to some of the documents requested here, App. 100) would have to be reviewed by the district court to determine whether they were exempt from disclosure under 552(b)(4). 425 F. 2d at 582. Thus, *Grumman* leaves open many questions which the district court will have to resolve to determine whether respondents are entitled to disclosure of the documents they seek.

II

THE INJUNCTION AGAINST FURTHER PROCEEDINGS BEFORE THE RENEGOTIATION BOARD CONSTITUTES AN IMPROPER JUDICIAL INTERFERENCE WITH THE BOARD'S ADMINISTRATIVE PROCESS WHICH THE RENEGOTIATION ACT DOES NOT PERMIT.

This Court has three times held that litigants before the Renegotiation Board cannot get the Board's proceedings enjoined, even on constitutional grounds, prior to exhaustion of their administrative remedies before the agency. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 742; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540. That principle is fully applicable to these cases. There is nothing in the Freedom of Information Act that warrants creating an exception to the principle on the basis of the respondents' contention that denying them access to Board records whose disclosure the latter Act allegedly requires would deny them due process.

Those cases hold that the courts have no authority or "lawful function" [26] to enjoin renegotiation proceedings prior to the completion of the statutory judicial proceedings before the Tax Court (now the Court of Claims), regardless of whether the renegotiation proceedings are challenged on constitutional (*Aircraft*, *Lichter*), statutory (*Macauley*) or procedural (*Lichter*) grounds. This Court's reasoning was that

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[26] *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, *supra*, 331 U.S. at 767.

the contractor is afforded a due process hearing on the question of excessive profits by the *de novo* proceedings before the Tax Court, and that until that court has decided the question an injunction "would violate the 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Macauley* v. *Waterman Steamship Corp.*, *supra*, 327 U.S. at 543, quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51.

The Court's decisions reflect the congressional purposes and policy in renegotiation matters, for "the exhaustion problem and that of equity jurisdiction * * * both are colored by the relevant specific provisions of the Renegotiation Acts * * *." *Aircraft*, *supra*, 331 U.S. at 764.[27] Under the Renegotiation Act, proceedings before the Board are directed to informal renegotiation, and give the parties an opportunity to reach an agreement, or, if this is impossible, permit the Board to determine excess profits. The proceedings are to be "expeditiously resolved" by the Board, in light of the "primary need for speed and definiteness in these matters (*Lichter*, *supra*, 334 U.S. at 791). In fact, the statute's

> entire structure indicates the congressional purpose to have matters of renegotiation promptly

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[27] Accord, *e.g.*, *McKart* v. *United States*, 395 U.S. 185, 193 ("Application of the doctrine [of exhaustion] to specific cases requires an understanding of its purposes and of the particular administrative scheme involved").

> and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded. * * *
>
> At the height of the war Congress recognized * * * that speed in procurement, and consequently in production of war materials, outweighed all other considerations normally applicable. [Renegotiation problems often] worked to hinder and delay the process of procurement. Congress therefore sought, so far as possible, to relieve the interrelated processes from the tedious burden of litigation. [*Aircraft*, *supra*, 331 U.S. at 770]

Once the initial administrative proceedings have been completed, *de novo* review is available to the contractor before the Tax Court (now the Court of Claims), which may review all issues of fact and law, including, of course, constitutional issues. Cf. *Aircraft*, *supra*, 331 U.S. at 769, n. 30, citing 89 Cong. Rec. 9930. The Court concluded, therefore, that "Congress clearly and at the very least intended the Tax Court's functions * * * to be fully performed, before judicial intervention should take place * * *." *Aircraft*, *supra*, 331 U.S. at 771.

Congress did not intend, and these decisions do not suggest, that the exhaustion requirement turns upon the nature of the challenge to the administrative procedures.[28] Nor are these decisions limited, as the

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[28] In *Aircraft*, the contractor argued that the exhaustion requirement set forth in *Macauley* was inapplicable because that case "raised only questions of coverage, not issues of

court of appeals concluded, to questions concerning the extent of contractors' liability or susceptibility to renegotiation (Pet. App. A, p. 29a). In *Lichter*, for example, the Court rejected an attack upon the constitutionality of the absence of an administrative hearing before the Board (334 U.S. at 791-792).[29]

The court below has adopted arguments substantially identical to those rejected in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, *supra*. "Apart from allegations going to constitutionality and coverage," Aircraft "asserted defects in the renegotiation procedures followed," because the Board's action "was based in part at least on information said to have been obtained from 'governmental and other reliable sources' which the appellant has had no opportunity

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constitutionality. Here both types of questions are presented." 331 U.S. at 767. The Court concluded that "we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this case." *Id.* at 771.

[29] In *Lichter*, the contractor did not petition the Tax Court for redetermination of the Renegotiation Board's assessment of the excess profits due. This Court rejected the contractor's claim that the Act was unconstitutional on its face, and concluded that the Board's decision had become final by virtue of the contractor's failure to resort to the Tax Court. Thus, although *Lichter* involved a judicial review of the agency procedures when there had been no Tax Court decision, the renegotiation procedure had been completed by the contractor's failure to pursue the further remedy originally available. It was, therefore, not a situation in which an ongoing renegotiation proceeding was interrupted to permit judicial review.

to examine or rebut." 331 U.S. at 758-759, n.12.[30] Despite these asserted defects in board procedures, which were similar to those urged here,[31] the Court refused to permit renegotiation proceedings to be enjoined prior to completion of the administrative proc-

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[30] The contractor alleged that the Board's procedures denied it due process because "plaintiff was afforded no opportunity to examine or rebut any of the said extraneous data so obtained and considered by the defendants," nor was it "afforded any opportunity to present any arguments or contentions based upon such financial, operating or other data obtained," and "accordingly it could not know all the matters and things about which it might present arguments and contentions." No. 95, O.T. 1946, Transcript of Record, Vol. I, pp. 136, 141. The contractor further alleged that the statement of facts and reasons for the Board's decision, to which it was entitled under the Renegotiation Act, must be produced prior to the renegotiation because otherwise "such statement is of no benefit to the plaintiff." *Id.* at 142.

[31] Both Astro Communication and Bannercraft alleged that the Board "relied materially upon documents in its possession * * * which were not made available to Plaintiff * * *. Plaintiff has been unable to respond to the information contained therein * * * and Plaintiff has therefore been * * * unable reasonably to avail itself of the administrative proceeding" (App. 19, 38). Both further alleged that "[c]ontinuation of renegotiation proceedings without the availability to Plaintiff of the documents * * * would cause Plaintiff to be unable adequately, reasonably or fairly to present its position in such renegotiation proceedings, and would * * * deny Plaintiff due process of law" (App. 16, 40).

Lilly alleged that "the Plaintiff corporations do not know what information the Board obtained from other sources * * * or the significance or qualitative or quantitative value given to such information. Consequently * * * Plaintiff corporations are unable to determine whether the Board has information which should be corrected or supplemented, what arguments to make, what facts to explore and develop" (App. 85).

ess. Is concluded that "[t]o countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm." 331 U.S. at 781.

The court of appeals concluded that equitable intervention was necessary because it viewed the Renegotiation Act as indicating that "the administrative process cannot function as it was intended to function until [the contractors] are given access to the documents" (Pet. App. A, p. 20a), and therefore that such access must be provided at an early stage in the proceedings. But as this Court has pointed out, the entire legislative scheme is intended "to relieve the interrelated processes from the tedious burden of litigation" and expedite the informal renegotiation proceedings.[22] Injecting the courts into this process to referee disputes over particular documents would frustrate rather than further the Renegotiation Act's basic policy.

The Act and the Board's regulations contemplate a negotiation process in which limited disclosures of the bases upon which Board actions are taken are made at specified stages of the renegotiation proceeding. As the dissent below shows, intervention by the district court to halt renegotiation proceedings until documents are made available upsets this carefully considered regulatory scheme:

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[22] *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, *supra*, 331 U.S. at 777.

[T]he majority seems to ignore one of the critical aspects of negotiation that sets it apart from litigation as a device for resolving disputes: the skillful negotiator carefully guards and controls his adversary's access to the critical bits of information that would reveal the strengths or weaknesses of his bargaining position.

The regulations describing the Board's proceedings reflect this characteristic approach to the release of information in negotiation. Indeed, the "seemingly endless *de novo* reviews" that the majority consider are intended to coerce settlement at lower levels of the administrative machinery by making appeals more risky, instead reflect the recognition that neither party to the renegotiation is to be bound by *or limited to* the information he revealed at the previous step. The *de novo* reviews permit the continuous introduction of new information and shifting bargaining positions as the contractors and the Government negotiate their way toward a final settlement. In the context of this negotiation procedure, the regulations are quite explicit concerning the timing and content of the Government's release of statements regarding the facts and rationale on which they have relied at each stage of the administrative process. 32 C.F.R. §§ 1472.3(f), 1477.2, 1477.3. * * *

[B]y interrupting the administrative proceedings while Information Act claims are being resolved in collateral judicial proceedings [the majority] have totally destroyed the balance of negotiating strength that Congress intended to exist under the Renegotiation Act.

In brief, the irreparable injury urged by these appellees as the source of their right to injunc-

> tive relief is a temporary condition that was carefully and intentionally imbedded in the structure of the renegotiation procedures—the timing of the Government's release of information concerning their bargaining position. * * * [Pet. App. A, pp. 41a-42a.]

The Freedom of Information Act does not change the clear design of the Renegotiation Act to assure that renegotiation proceeds expeditiously without interruptions for judicial review. The Freedom of Information Act, as we have shown above, was intended to assure that agencies not "deny legitimate information to the public" (S. Rep. No. 813, at 3); there is no indication therein of any intention to amend the Renegotiation Act, as interpreted by this Court, to permit judicial injunctions against ongoing renegotiation proceedings. Indeed, Congress has subsequently reviewed the renegotiation procedures and altered them only to the extent of substituting the Court of Claims for the Tax Court as the forum for *de novo* judicial consideration. Congress did not thereby intend to make any other significant change in renegotiation proceedings. See S. Rep. No. 245, 92d Cong., 1st Sess.

In its discussion of the traditional equitable factors governing injunctive relief (Pet. App. A, pp. 19a-30a), the court of appeals indicated that the administrative proceedings do not provide an adequate remedy, and that there is "no legitimate judicial policy" served by requiring exhaustion of renegotiation proceedings, because the contractors have exhausted whatever remedies exist administratively under the

Freedom of Information Act (Pet. App. A, p. 25a, n. 11). But exhausting the remedies under the Information Act entitles respondents to prompt judicial consideration of their Information Act claims; it does not authorize enjoining the Board's renegotiation proceedings. The remedy which must be exhausted before renegotiation proceedings can be reviewed is the administrative remedy provided by the Renegotiation Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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